

# Annexure A

## Carbon-cost pass-through: model legislative provisions

### Division 1 – Recipients’ liability for carbon costs<sup>1</sup>

#### 1 Definitions

In this Division:

**appointed day** means the day on which this Act received the Royal Assent.<sup>2</sup>

**arbitrated offer** has the meaning given by section 3.

**arbitrator** means a person or body specified in, or included in a class of persons or bodies specified in, the regulations.<sup>3</sup>

**change**, to the consideration for a supply, includes a change to the method by which the consideration is worked out.

**eligible agreement** means an agreement which:

- (a) is in writing; and
- (b) specifically identifies a supply and identifies the consideration in money, or a way of working out the consideration in money, for the supply; and
- (c) was made before the appointed day.

**eligible supply** means a supply in relation to which there are identified carbon costs and which is made before the occurrence of a review opportunity under an eligible agreement which:

- (a) does not provide that consideration for the supply is to be changed to take account of identified carbon costs; and
- (b) does not provide that consideration for the supply is not to be changed to take account of identified carbon costs or any similar imposition relating to the reduction or removal of greenhouse gases.<sup>4</sup>

**identified carbon costs** means, in relation to a supply, the additional costs to the supplier of providing the supply which are attributable to a requirement imposed by this Act for the supplier, or a related body corporate (within the meaning of the *Corporations Act 2001*) of the supplier, to surrender Australian emissions units or eligible international emissions units, less the reduced costs to the supplier of providing the supply which are attributable to a scheme, program or initiative (including a provision of this Act) specified in the regulations.<sup>5</sup>

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<sup>1</sup> These provisions are, intentionally, modelled closely on Division 2 of Part 3 of the *A New Tax System (Goods and Services Tax Transition) Act 1999* as inserted by the *Tax Laws Amendment (Long-term Non-reviewable Contracts) Act 2005*.

<sup>2</sup> Or some earlier date, for example the date when the government first produces draft exposure legislation for the CPRS.

<sup>3</sup> For example, in the GST transitional provisions, the following bodies and their members are specified by the regulations: The Institute of Arbitrators and Mediators Australia, The Australian Commercial Disputes Centre, The Chartered Institute of Arbitrators Australia, and LEADR. See *A New Tax System (Goods and Services Tax Transition) Regulations 2000* clause 3A.

<sup>4</sup> Note that contracts which expressly provide for carbon costs not to be passed through to the recipient are excluded from the operation of these provisions.

<sup>5</sup> The regulations may specify, for example, the Climate Change Adjustment Fund and Part 5 of this Act for this purpose.

**review opportunity** means, in relation to an agreement, an opportunity which arises under the agreement for the supplier under the agreement (acting either alone or with the agreement of one or more of the other parties to the agreement):

- (a) to change the consideration directly or indirectly to take account of the imposition of identified carbon costs; or
- (b) to conduct, on or after the scheme commencement date, a general review, renegotiation or alteration of the consideration; or
- (c) to conduct, on or after the scheme commencement date, a general review, renegotiation or alteration of the consideration that takes account of the imposition of the identified carbon costs.

**scheme commencement date** means 1 July 2010.

## 2 Carbon costs payable by recipients of supplies

- (1) This section applies in relation to an eligible supply.
- (2) The recipient of the supply is liable to reimburse to the supplier the identified carbon costs associated with the supply if:
  - (a) the recipient notifies the supplier in writing that the recipient elects to reimburse those costs to the supplier; or
  - (b) the recipient has failed to accept an arbitrated offer by the supplier to change the consideration for supplies that are made on or after the scheme commencement date and that are specifically identified by the agreement.
- (3) Subsection (2) does not apply if, before either of the events referred to in the subsection occurs, the supplier and the recipient agree (whether or not an arbitrated offer is made) to change the consideration for supplies that are made on or after the scheme commencement date and that are specifically identified in the agreement.
- (4) For the purposes of paragraph (2)(b), the recipient is taken to have failed to accept the offer referred to in that paragraph if:
  - (a) the recipient gives to the supplier a written rejection of the offer; or
  - (b) the final offer period referred to in section 6 expires without the recipient having notified the supplier that the recipient accepts the offer.
- (5) An election referred to in paragraph (2)(a) cannot be revoked.
- (6) A liability incurred pursuant to subsection (2) is a civil debt.<sup>6</sup>

## 3 Arbitrated offers

An offer (the **final offer**) to change the consideration for supplies that are made on or after the scheme commencement date and that are specifically identified by an eligible agreement is an **arbitrated offer** if:

- (a) the supplier has, in accordance with section 4, made an offer (the **initial offer**) to the recipient of the supplies to change the consideration; and
- (b) change to the consideration has been arbitrated in accordance with section 5; and
- (c) the supplier makes the final offer in accordance with section 6.

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<sup>6</sup> This method of reimbursing the supplier is designed so as not to involve government or interfere with the operation of the CPRS in any way.

#### **4 Initial offer**

- (1) The initial offer:
  - (a) must be in writing; and
  - (b) must set out a change to the consideration for the supplies; and
  - (c) must state the period (the ***initial offer period***) for which the offer remains open.
- (2) The initial offer period must be a period of at least 28 days after the supplier gives the initial offer to the recipient.

#### **5 Arbitration**

- (1) Change to the consideration must be arbitrated as follows:
  - (a) the supplier must apply to an arbitrator for the appointment of an assessor to determine an appropriate change to the consideration;
  - (b) the arbitrator must appoint as an assessor a person who the arbitrator is satisfied:
    - (i) is suitably qualified to determine an appropriate change to the consideration; and
    - (ii) is independent of both the supplier and the recipient;
  - (c) in determining an appropriate change, the assessor must only take into account the impact of the identified carbon costs on the costs and expenses of the supplier or a related body corporate of the supplier;
  - (d) the assessor's determination of an appropriate change must be made within 28 days of the end of the offer period and:
    - (i) be in writing, signed and dated by the assessor; or
    - (ii) be in the form specified in the regulations.
- (2) The supplier must not apply under paragraph (1)(a) until after:
  - (a) the end of the initial offer period; or
  - (b) the recipient gives to the supplier a written rejection of the initial offer;whichever happens earlier.

#### **6 Final offer**

- (1) The final offer:
  - (a) must be in writing; and
  - (b) must set out as a change to the consideration the assessor's determination of an appropriate change; and
  - (c) must state the period (the ***final offer period***) for which the offer remains open.
- (2) The final offer period must be a period of at least 21 days after the supplier gives the final offer to the recipient.